

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MICHAEL J. LEE, :  
: Plaintiff, : 21 Civ. 8629 (PAE) (RWL)  
-v- :  
: :  
CARTER, et al., : OPINION & ORDER  
: Defendant. :  
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PAUL A. ENGELMAYER, District Judge:

This lawsuit against four New York City Department of Corrections officials is brought by *pro se* plaintiff Michael J. Lee, who alleges violations of his constitutional rights under 42 U.S.C. § 1983. Dkt. 1. Pending now is the July 28, 2022 Report and Recommendation of the Hon. Robert W. Lehrburger, United States Magistrate Judge, recommending that the Court dismiss the complaint for failure to prosecute under Federal Rule of Civil Procedure 41(b), or, alternatively, for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. 70 (“Report”). The Court incorporates by reference the summary of the facts set out in the Report.

For the following reasons, the Court adopts the Report’s recommendation that the case be dismissed for failure to prosecute.

#### DISCUSSION

In reviewing a Report and Recommendation, a district court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). “To accept those portions of the report to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the

record.” *Ruiz v. Citibank, N.A.*, No. 10 Civ. 5950 (KPF), 2014 WL 4635575, at \*2 (S.D.N.Y. Aug. 19, 2014) (quoting *King v. Greiner*, No. 02 Civ. 5810 (DLC), 2009 WL 2001439, at \*4 (S.D.N.Y. July 8, 2009)); *see also, e.g.*, *Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

As no party has submitted objections to the Report, review for clear error is appropriate. The Report identifies three separate viable grounds for dismissal: (1) under Federal Rule of Civil Procedure 41(b) for failure to prosecute; (2) under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction due to plaintiff’s failure to exhaust his administrative remedies; and (3) under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim.

The Court finds the Report’s assessment of all three grounds for dismissal persuasive, with no facial or legal error in its conclusions. The Court elects to dismiss pursuant to Rule 41(b), given plaintiff’s longstanding failure to prosecute the case as chronicled in the Report. In particular, plaintiff has failed to make any filings on the docket since October 29, 2021, and has failed to update his address. *See* Report at 7. Accordingly, the Report is adopted as to the recommendation to dismiss for failure to prosecute. The Court has no occasion to act on the other bases for dismissal identified in the Report. Given the basis for dismissal on which the Court has relied, the dismissal is without prejudice.

Because the Report explicitly states that “failure to object within fourteen (14) days will result in a waiver of objections and will preclude appellate review,” Report at 18, the parties’ failure to object operates as a waiver of appellate review. *See Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008) (citing *Small v. Sec’y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam)).

## CONCLUSION

For the foregoing reasons, the Court dismisses without prejudice all claims in this matter for plaintiff's failure to prosecute. The Court respectfully directs the Clerk of Court to mail a copy of this decision to plaintiff at the address on file, to close all pending motions, and to close this case.

SO ORDERED.



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Paul A. Engelmayer  
United States District Judge

Dated: August 12, 2022  
New York, New York